

Letter of Findings Number: 04-20110195
Sales/Use Tax
For Tax Years 2008-2009

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ISSUE

I. Sales/Use Tax—Equipment.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-3-2; IC § 6-2.5-3-4; [45 IAC 2.2-4-26](#); [45 IAC 2.2-4-27](#).

Taxpayer protests the assessment of use tax on equipment.

STATEMENT OF FACTS

Taxpayer's business involves design and building contracting for feed and grain facilities. Taxpayer was audited by the Indiana Department of Revenue ("Department"). Following the audit, Taxpayer filed a protest. A telephone hearing was held, and this Letter of Findings results. Further facts will be supplied as required below.

I. Sales/Use Tax—Equipment.

DISCUSSION

At the outset, the Department notes that the burden of proving a proposed assessment is wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Taxpayer protests the proposed assessment of tax assessed relating to a crane. In its protest letter, Taxpayer states it was "surprised when [it] ran into some completely unexpected problems with use tax issues." The only issue that Taxpayer addresses in its protest is the crane; Taxpayer's protest letter states in relevant part: The majority of the use tax due is a result of a 65 ton crane that was purchased in May 2008 from a vendor in [another State]. The crane was purchased with the intent of reselling it within three to six months and it was physically in [the other State] for the majority of the time over the next few years. During the fall of 2008, the U.S. economy began to suffer and our prospective customers for the crane disappeared. With a large amount of short term debt incurred to purchase the crane, were forced to put it into service through our construction company to generate some revenue to make the payments. At this point, we didn't realize that we owed any sales tax on the purchase since we intended to sell it. The crane came to Indiana for a brief period of time to be used on some projects and returned to [the other State]. (Emphasis added).

The Audit Report states that Taxpayer purchased a "rough terrain crane listed as a capital asset which no sales or use tax was paid[.]" and that the assessment also included "crane rentals."

[45 IAC 2.2-4-26](#) states:

(a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

(b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely *[sic]* separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

(c) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.

(d) In order to be exempt on such purchases the contractor must be registered as a retail merchant and must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.

(e) Utilities, machinery, tools, forms, supplies, equipment or any other items used by or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

(Emphasis added).

As [45 IAC 2.2-4-27](#)(c) states:

In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

(Emphasis added).

Taxpayer argues that it purchased the crane out of state with the intent of reselling it, but due to the economy ended up using the crane in Indiana (in correspondence to the Department Taxpayer stated that the crane was used in Indiana for a month in 2009; Taxpayer also provided a link to an online advertisement where the crane was listed for sale). Regarding use tax, IC § 6-2.5-3-2 states in relevant part:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

(Emphasis added).

Taxpayer's crane does not come within IC § 6-2.5-3-4, which states:

(a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:

(1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or

(2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of [IC 6-2.5-5](#), except [IC 6-2.5-5-24](#)(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.

(b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

As noted above, [45 IAC 2.2-4-26](#)(e) states in part that "equipment or any other items used by or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt...." Taxpayer purchased the crane out of state and did not pay sales tax at the time of purchase; Taxpayer subsequently used the crane in Indiana. Thus Taxpayer is subject to Indiana's use tax on the crane.

FINDING

Taxpayer's protest is respectfully denied.

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